



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL LOCAL DIVISION, DURBAN**

CASE NO: 11267/2014

In the matter between:

SIX-A-PROPERTY INVESTMENTS (PTY) LTD

APPLICANT

And

CORNELIS JOHANNES ANDRIES FERREIRA

FIRST RESPONDENT

SHERIFF OF THE HIGH COURT, PINETOWN

SECOND RESPONDENT

JUDGMENT

Date of Judgment delivered: 10 September 2015

MARKS, AJ:

1. The applicant Six-A-Property Investments (Pty) Ltd, is a company duly incorporated and registered according to law which has its registered office at 5 Park Lane, Kloof, Durban. The first respondent is Cornelis Johannes Andries Ferreira, a male attorney who is also a shareholder of the applicant. The second respondent is the Sheriff of the High Court Pinetown.

2. The applicant seeks a declaratory order that set off of debts applies between it and the first respondent and costs of the application. No relief is claimed against the second respondent.

3. In a counter application, the first respondent seeks a declaratory order in the following terms:

3.1) that reciprocal debts owed by the applicant and first respondent to each other are not subject to the operation of set off;

3.2) that any amounts allegedly owed by the first respondent to the applicant prior to 28 February 2012 have been extinguished by prescription; and

3.3) that the applicant pays the costs of the counter application;

Both these applications are opposed by the respective parties.

4. Further applications and counter applications relating to striking out of paragraphs 21.2 of the applicant's replying affidavit as well as an application to admit a further affidavit together with costs, were settled by the parties in a draft order prayed by consent which was handed into court when the matter was set down on 28 August 2015

on an opposed basis and argued. This order is recorded at paragraphs 13.1 – 13.4 of this judgment.

[5] **BACKGROUND AND SUMMARY OF FACTS THAT ARE NOT IN DISPUTE**

There are no disputes of facts and the following is common cause: –

5.1) The applicant was formed in 1983 as a vehicle to acquire business premises for a firm of attorneys, Halse Havemann & Lloyd. All the shareholders of the applicant are attorneys, including the first respondent who is a 1/6th shareholder in the applicant.

5.2) On 30 March 2004 the shareholders concluded an agreement which conferred on each of them the right to occupy their respective portions of the business premises , in consideration for paying their pro-rata share of the expenses of the applicant. The pertinent term of the contract was that the first respondent was obligated to pay his 1/6th share of the company's monthly expenses without deduction or demand as determined by the company's auditors from time to time.

5.3) In September 2004, and every year thereafter up to 21 November 2012, the first respondent objected to the applicant's annual financial statements. The relationship between the parties then became extremely acrimonious and fraught with disputes resulting in continuous litigation between the applicant and the first respondent.

5.4) In 2005 the applicant unlawfully locked the first respondent out of his suite. The first respondent successfully brought a spoliation application against the applicant which was granted with costs which were paid by the applicant.

5.5) Then, in 2007 the first respondent launched a minority shareholders relief application under s 252 of the Companies Act, 1973 and for the winding up of the applicant. These applications were unsuccessful and were dismissed with costs which were paid by the first respondent to the applicant.

5.6) In September 2011 the applicant launched an ejectment application, which ran its full course through appeals and petitions to the Supreme Court of Appeal. The taxed bill of cost of this litigation amounted to R52 921.76. (It is this undisputed debt that the applicant seeks in this application to avoid by the operation of set off.)

5.7) On 24 January 2013, the applicant's auditors submitted an Auditors' Report to the applicant confirming the accuracy of the expenses payable by the first respondent for his 1/6th share of the total expenses due by him for 2004 to 2012 inclusive. The total amount determined by the auditors to be owing for the period 2004 – 2012 by the first respondent was R282 630.04. This amount is disputed by the first respondent.

5.8) On 26 September 2014 the present application was launched by the applicant, claiming set off of the R52 921.76 it owes the first respondent from the taxed bill, against the R217 612.61 which it alleges the first respondent owes it in unpaid contribution to expenses. The first respondent opposed the application and brought a counter application of prescription which was opposed by the applicant.

[6] **ISSUES FOR DETERMINATION**

The court therefore has to determine the following:

6.1) whether the applicant has established that the debt it seeks to set off against exists. This requires a determination of when the alleged debt became due and owing in order to determine whether or not it has prescribed;

6.2) whether the amount of the First Respondent's debt has been established and is liquidated.

6.3) whether set off was excluded in terms of the agreement.

[7] **ARGUMENT**

7.1) The applicant contended that it is entitled to apply set off because the judgment delivered in favour of the first respondent in the ejectment proceedings meant that the liability of the first respondent's share of expenses would only be due and payable after the auditors had done a proper calculation of the amount owing. The auditors had completed the audit of the financial affairs of the company and had made the determination. A letter to this effect was sent to the first respondent on 24 January 2013 bringing this to his attention. Therefore, the debt became due on that date and therefore had not prescribed. The Court was referred to a number of authorities which will be dealt with later in this judgment. Mr *Lingerfelder* for the applicant argued further that the

contract or agreement did not preclude set off despite including the terms “without deduction or demand”.

7.2) The first respondent contended that firstly, the existence and amount of this alleged debt is disputed by him, secondly, the alleged debt had been extinguished by prescription and thirdly the agreement between the parties¹, excluded set off being raised. Mr De Beer SC, for the first respondent, further argued that the list of authorities referred to in the applicant’s heads of argument are legally irrelevant to the determination of this application, and / or are distinguishable in principle or distinguishable on the facts.

[8] **THE LEGAL POSITION: – SET OFF**

8.1) In order for set off to operate, the reciprocal debts must be liquidated in the sense that the debts:

- (i) must be based on liquid document; or
- (ii) are admitted; or
- (iii) the money value as been ascertained; or
- (iv) are capable of prompt assessment².

¹ Annexure A to the founding affidavit of the applicant of the papers p

² *Fatti’s Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T) at 739

8.2) In the present matter, the applicant has argued that the money value has been ascertained that the first respondent owes the amount of R217 612,61. The applicant further contends that this amount was determined by auditors. Furthermore, it is not necessary to prove the exact amount of a liquidated claim if it is capable of prompt assessment.

8.3) The first respondent disputes the amount owing and argues that from 2004 until 2012, he has disputed these amounts which is evident from the papers. Furthermore, if any amounts are owing, these amounts are not capable of prompt assessment. Furthermore, the first respondent avers that the auditor's report is nothing more than a collection of data from the monthly financial statements that he has objected to all along.

8.4) It is trite, that set off cannot be defeated merely by denying or querying a debt that otherwise qualifies. It is not necessary to prove the exact amount of a defendant's liquidated claim if it is clear that it is capable of prompt assessment and it exceeds the amount of the plaintiff's claim³.

8.5) Set off is really equivalent to payment. As soon as there are two debts in existence, the one debt can be compensated against the other. By operation of law, the one debt extinguishes the other *pro tanto*⁴. Furthermore the operation of set off dates back to the moment when the two parties concerned were reciprocally liable to one another. In other words set off cannot come into effect until or relate back to a time before both debts are due. A debt that has already prescribed before the necessary mutuality of debts arises cannot under the common law be set off.

³ Christie's 'The law of contract in South Africa 6th Edition' p 495

⁴ *Great North Farms (EDMS) BPK v Ras* 1972 (4) SA 7 (T) at 9E – F citing with approval *In re: Trans – African Insurance Co Ltd (in liquidation)* 1958 (4) SA 324 (W).

8.6) Before applying the facts of the particular matter to the principles of set off, it is incumbent upon this court to determine whether there are reciprocal debts that are capable at being set off, as the first respondent claims that any alleged debt incurred before 2012 had been extinguished due to prescription.

[9] **THE LEGAL POSITION – EXTINGUISHIVE PRESCRIPTION**

9.1) In terms of section 12(1) the Prescription Act, 1969 prescription begins to run as soon as the deb is due. Section 12(3) of the Prescription Act further provides:

‘A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.’

9.2) The applicant contends that the first respondent's debt arose out of his 1/6th liability to pay the expenses of the applicant for the period 2006 to 28 February 2012. However, it is common cause that the first respondent has consistently disputed the debt or amounts owed by him to the applicant as is evident by his various objections raised in the correspondence to the applicant, dated from 27 September 2004 until 21 November 2012.⁵ During this period the applicant was fully aware of the debts that were due and yet had taken no legal steps such as the issuing of a summons to claim payment of the first respondent's debts. Instead the applicant sought an ejectment order in 2011, based on the fact that they believed his refusal to pay his debt amounted to a repudiation of the agreement entered into in 2004.

⁵ Annexures “CF1” to “CF9” to the answering affidavit; papers pages 52 -71.

9.3) The applicant then interpreted the legal consequences of the ejectment judgment to mean that until the auditors do a calculation and then notify the first respondent of the amount due for contributions for expenses, the applicant would have an incomplete cause of action. The applicant believes that therefore prescription of the applicant's claim against the first respondent did not begin to run as contemplated in s12(1) of the Prescription Act in that as it had an incomplete cause of action, the debt only became due after the auditors had completed the audit and notified the first respondent of all the amounts he owed since 2006 – 2012 in a letter sent to him during February 2013⁶.

9.4) This argument is untenable for a number of reasons. Firstly, no court may draft a 'new' agreement for the parties. Secondly, if the applicant's contention is correct, this would mean that the applicant could unilaterally and indefinitely postpone the commencement of the running of prescription by delaying the determination of the auditors for the amount due by the first respondent - as indeed happened in this case where the auditors 'determined' the first respondent's alleged debt on 24 January 2013 in respect of the period 2006 to 28th February 2012. Thirdly, the applicant was to establish its alleged claims in law by taking timeous legal steps against the first respondent which it never did.

9.5) The cases referred to by the applicant do not assist in its application as I am in agreement with Mr *De Beer* SC for the first respondent that they are legally irrelevant to this determination, and / or distinguishable in principle or on the facts. I state this for the following reasons:

9.5.1) The cases of *Aspek Pipe Co (Pty) Ltd and Another v Mauerberger and Others* 1968 (1) SA 517 (C); *Sammel And Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 A; and *Garden Province Investment and Others v Aleph*

⁶ CF 3 of the papers pages 83 – 84.

(Pty) Ltd And Others 1979 (2) SA 525 (D) pertain to oppressive conduct and shareholders relief including the shareholders majority decision prevailing.

9.5.2) *Benson and Another v Walters and Others* 1984 (1) SA 73 (A) pertains to the taxation of a bill of costs between an attorney and his client. The court held that prescription runs not from the date of taxation but from date of completion or termination of an attorney's mandate.

9.5.3) *Deloitte Haskin & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsh (PTY) Ltd* 1991 (1) SA 525 (A) related to a claim that was based in contract and not on the common law. The contract itself introduced a *mora* date that the consultants had to supply a system or the services of a third party would be consulted. In the present matter, the applicant's auditors are not a 'third party' which is required to determine the amount of liability. The auditors in the present case are the applicants own auditors. The *Deloitte* case related to a claim for payment of damages. In the present matter the applicant is seeking to enforce a contract.

9.5.4) *Lester Investments (PTY) Ltd v Narshi* 1951 (2) SA 464 (C) pertains to ejectment under the provisions of the Rent Act. It was held on the facts that the tenants claim for damages for improvements to the leased property was liquidated for the purpose of set off. This matter is distinguishable on the facts.

9.5.5) *List v Jungers* 1979 (3) SA 106 (A) pertains to the interpretation of what constitutes a 'guarantee' within the context of a particular contract.

9.5.6) *The Master v IL Back and Co Ltd and Others* 1983 (1) SA 986 (A) pertained to a claim by the Master for his fees and the question of whether such fees constituted a 'tax or duty' for the purposes of prescription. The Master's claim was held to be one for fees for which the prescription period was three years and not thirty years prescribed for a 'tax or duty.'

9.6) The argument by the applicant that its claim is conditional in the sense that it only arose once an amount has been determined by the auditors, after Mnguni J's judgment in 2013, is therefore wrong. The judgment of Mnguni J did not in any way make out a new conditional contract for the parties but merely interpreted the contract.

9.7) Therefore, the applicant cannot rely on the argument that the debt did not become due before the judgment of Mnguni J. To my mind any debt owed by the first respondent to the applicant as at 28 February 2012 have been extinguished by prescription, as the applicant had knowledge of the debt since 2006 and had taken no legal steps against the first respondent to recover the disputed debt. The applicant had sat back and failed to calculate the alleged debt according to its contractual obligation, with reasonable care and within a reasonable time period.

9.8) It follows that the applicant has no claim to 'set off' against the respondents undisputed claim for taxed costs. Moreover, the other legal requirements, for set off aforementioned, have in any event, not been satisfied, in that it is not admitted, not based on a liquid document, the money value has not been correctly ascertained and is not capable of prompt assessment.

9.9) In the event that I am wrong it is necessary to determine whether the agreement excluded set off between the contracting parties.

[10] **THE AGREEMENT**

10.1) The question whether the parties can contract out of the operation of set off was answered in *Herrigell NO v Bon Roads Construction (Pty) Ltd* 1980 (4) SA 669 SWA, where it was held: –

“that by virtue of the agreement whereby the parties both agreed or at least by necessary implication in their dealings with each other agreed, not to set off their reciprocal debts but to pay them to each other in full, the defendant was not entitled to claim set off operated⁷.”

10.2) The applicant has argued further that it was not a party to the contract. Moreover the phrase ‘without deduction or demand’ appearing in the contract functions only within the context of matters dealt with therein and between the shareholders.

10.3) This argument is untenable as the contract is clearly between the company on the one hand and the first respondent and other shareholders on the other hand. Besides clause 1 relating specifically to the first respondent, clauses 6 and 7 relates to an agreement between the company and other parties in respect of the transfer of the shares held by the respective parties. Moreover it was on the strength of this very same contract between the parties that the aforementioned ejectment application was launched.

10.4) Clause 1 of the agreement states:

⁷ At p 676.

“That C J A Ferreira continues to occupy the portion of the premises on the ground floor Media House currently occupied by him without paying any consideration therefore other than the monthly expenditure referred to in 3 below without deduction or demand as determined by the company auditors from time to time.⁸” (my underlining)

10.5) The parties do not agree on the meaning of an expression in this contract, that is whether the words ‘without deduction or demand,’ excluded ‘set off.’ When interpreting a contract, the golden rule applicable is to ascertain and to follow the intention of the parties. The wording of the contract itself, or any admissible evidence under the circumstances, which affords a definite indication of the meaning of the contracting parties, is taken into account. A court should always give effect to that meaning⁹.

10.6) Considering the words of the contract one must have regard to the nature and purpose of the contract as a whole. In this matter the agreement between the parties was concluded in an attempt to regulate the obligations between the applicant and the first respondent. The first respondent would retain the use of his portion of the property and would pay his 1/6th share of the applicant’s monthly expenditure, without deduction or demand as determined by the auditors from time to time.

10.7) It follows that the intention of the parties were that the first respondent once given the auditor’s report from time to time was obligated to pay without deduction or demand. To my mind, these words did exclude set off. In other words, once a proper audited account was forwarded to the respondent, from time to time he would have been obligated to pay without deduction or demand. He could not claim set off.

⁸ Annexure A of the Founding Affidavit papers page 13.

⁹ Kerr “Law of Contract” 6th Edition p 386.

10.8) It is clear that the intention of the parties when concluding the contract or agreement in 2004 was to exclude set off. This can be seen from the conduct of the parties concerning the different disputes and litigation in the courts. The resultant costs orders against the respective unsuccessful party were paid to the successful party. There was no set off claimed in the past.

10.9) Moreover, the applicant and first respondent expressly or at least tacitly agreed, that set off would not operate between them or put differently, that they expressly, or by necessary implication contracted out of the applicability of set off to any mutual debt that may arise.

[11] **IN CONCLUSION**

11.1) The applicant had a duty to all the shareholders to ensure that a properly audited financial report be submitted to the first respondent from time to time after the contract was concluded in 2004. The applicant has failed to do so until 2013. The applicant has therefore failed to discharge the *onus* to prove that set off applies.

11.2) The first respondent however, has discharged the *onus* to prove that the alleged debts that were incurred by the first respondent up until 28 February 2012 have been extinguished by prescription.

[12] **COSTS**

12.1) In considering the issue of costs, the Court has a discretion which is to be exercised judicially. The Court is required to take into consideration the circumstances of the case, the issues at hand, the conduct of the parties and any other relevant circumstances.

12.2) The general rule is that the costs follow the result. In other words that party which is successful should be entitled to an order as to costs. There are no circumstances in this matter for the Court to deviate from the general principle.

12.3) However, the reserved costs occasioned by the adjournment of the opposed hearing on 19 May 2015 when the matter could not be argued is due to no fault of the parties and therefore in fairness the Court will order that these costs be costs in the cause.

[13] **ORDER**

13.1) Paragraph 21.2 of the applicant's replying affidavit is struck out on the basis that it is irrelevant, argumentative and speculative.

13.2) The applicant is directed to pay the costs of the first respondent's application to strike out dated 20 July 2015.

13.3) The affidavit by Dennis Vincent Fraser is admitted.

13.4) The applicant is directed to pay the costs of its conditional counter application for leave to file the affidavit of the said Dennis Vincent Fraser.

13.5) The application is dismissed with costs, such to include the costs of senior counsel where employed.

13.6) It is declared that reciprocal debts owed by the applicant and the first respondent to each other are not subject to the operation of set off subsequent to 30 March 2004.

13.7) It is declared that any alleged debts owed by the first respondent to the applicant up until 28 February 2012 have been extinguished by prescription.

13.8) The applicant is to pay the costs of the counter application, such to include the costs of senior counsel where employed.

13.9) The costs occasioned by the adjournment of the opposed hearing on 19 May 2015 shall be costs in the cause, such include the costs of senior counsel where employed.

S MARKS AJ

APPEARANCES

Attorney for the Applicant: Mr Lingenfelder SC, instructed by Lingenfelder Attorneys, Gillets; represented by Webber Attorneys, Durban.

Counsel for the Respondents: Mr De Beer SC, instructed by Louis M Podbielski, Durban.

Date of Hearing: 27 August 2015.

Date of Judgment: 10 September 2015.